

DA 99-732
April 19, 1999

Mr. James A. Rech
Landmark Site Development, LLC
480 Pleasant Street
Lee, MA 01238

Dear Mr. Rech:

This letter responds to your April 13, 1999 correspondence on behalf of Landmark Site Development, LLC ("Landmark"), requesting a waiver of the deadlines for resubmission of its short-form application (FCC Form 175) and submission of its upfront payment for Auction No. 23, scheduled to begin on April 27, 1999.¹ You claim that Landmark failed to make its upfront payment and resubmit its short-form application because of a combination of technical and administrative problems. As a result, you request permission to file after the deadlines, which were April 12, 1999 at 5:30 p.m (ET) for short-form application resubmissions and 6:00 p.m. (ET) for upfront payment and FCC Form 159 submissions.²

In order to obtain a waiver of the Commission's auction application deadline and upfront payment rules,³ Landmark must show: (i) that the underlying purpose of the rules will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or (ii) that the unique facts and circumstances of a particular case render application of the rules inequitable, unduly burdensome or otherwise contrary to the public interest.⁴ For the reasons stated below, we find that your letter and the circumstances surrounding Landmark's waiver request fail to meet the Commission's criteria for granting a waiver.

The Commission provided comprehensive information on auction application filing and

¹ See Letter from James A. Rech, President of Landmark Site Development to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (April 2, 1999) ("Letter").

² *Id.*

³ 47 C.F.R. §§ 101.1104; 1.2105; 101.1105(a); 1.2106.

⁴ 47 C.F.R. §§ 101.23 and 1.925; *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

payment procedures for Auction No. 23 in the *LMDS Public Notice*, which was released January 29, 1999.⁵ Applicants were advised that upfront payments were due via wire transfer by 6:00 p.m.(ET), April 12, 1999. The Commission specifically cautioned applicants that "[t]o avoid untimely payments, applicants should discuss arrangements (including bank closing schedules) with their banker several days before they plan to make the wire transfer, and allow sufficient time for the transfer to be initiated and completed before deadline."⁶

Landmark timely filed its short-form application (FCC Form 175) on March 23, 1999. After an initial review, the Commission found Landmark's application to be incomplete and notified it via a letter contained in a Federal Express package sent on April 5, 1999 that Landmark had failed to submit one or more of the exhibits required by Section 1.2105 of the Commission's Rules.⁷ The package also contained the *Status Public Notice*, which established a resubmission deadline for short-form applications (FCC Form 175) of April 12, 1999 at 5:30 p.m. (ET), reiterated the upfront payment deadline of April 12, 1999 at 6:00 p.m. (ET), and warned that late submissions would not be accepted.⁸

Your letter states that Landmark received the Commission's Federal Express package on April 6, 1999.⁹ You claim that a Landmark employee attempted to contact the Commission staff attorney listed in your notification letter concerning this matter on "several" occasions but that your office did not hear from the FCC until Thursday, April 8, 1999 at 7:00 p.m.¹⁰ You state that because Landmark's employee was not in the office at that time, Landmark had only one day to prepare its resubmission.¹¹ You further state that a damaged phone line on April 12, 1999 prevented Landmark's FCC Form 175 resubmission.¹²

On the basis of the record before us we find that Landmark has not demonstrated that application of the resubmission and upfront payment deadline rules in its case would undercut or frustrate their purpose. Further, we find that Landmark has not presented unique circumstances sufficient to justify grant of its waiver request. Your letter provides no information to explain Landmark's failure to submit its upfront payment and FCC Form 159

⁵ See "Auction of Local Multipoint Distribution Service Spectrum; Auction Notice and Filing Requirements for 168 Local Multipoint Distribution Service Licenses Scheduled for April 27, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 99-266 (rel. January 29, 1999) ("*LMDS Public Notice*").

⁶ *Id.* at 14.

⁷ 47 C.F.R. § 1.2105.

⁸ See "Auction of 168 Local Multipoint Distribution Service Licenses; Status of Applicants to Participate in Auction," *Public Notice*, DA 99-639 (rel. April 5, 1999) ("*Status Public Notice*").

⁹ Letter at ¶ 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at ¶ 2.

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on time. Thus, we find that Landmark's reasons for its failure to timely resubmit its short-form application (FCC Form 175) do not meet the Commission's criteria for a waiver. Although you cite the difficulties of one of Landmark's employees in making contact with the Commission staff attorney listed on Landmark's notification letter, it is the applicant's responsibility to ensure that deadlines are met and that those entrusted with the task of preparing and filing short-form applications have the requisite skill and experience to accomplish the task.¹³ The Commission's rules are best served by applying deadlines in a fair and consistent manner. Accordingly, we are not convinced that a grant of the waiver is warranted or would be in the public interest.

Therefore, Landmark's request for a waiver of the short-form application resubmission and upfront payment deadlines is denied. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.¹⁴

Sincerely,

Amy J. Zoslov
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

¹³ See Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division to Ms. Sylvia Lesse, Attorney for Elite JV, DA 99-692 (dated April 13, 1999), *citing* Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division to John Reardon, Esq., Secretary to the Board of Directors and General Counsel, Mobex Communications, 13 FCC Rcd 17,877 (1998).

¹⁴ 47 C.F.R. § 0.331.